INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdiction	1
1. Statutory Provisions Sustaining Jurisdiction	1
2. State Statute Drawn Into Question and Decision in Favor of Its Validity	2
3. Finality of Judgment	5
4. Judgment of Highest State Court	5
5. Appeal Timely Taken	7
6. Constitutional Issue Timely and Sufficiently Raised	7
7. Nature of the Case	8
Conclusion	12

Table of Authorities Cited

Cases:

Berkeley Guar. B. & L. Assn. v. *Cunningham*, 218 Cal. 714	6
Carlson v. *California*, 310 U. S. 106, 111N5	5
Chy Lung v. *Freeman*, 92 U. S. 275	9
Hamilton v. *Regents of U. C.*, 293 U. S. 245, 257-8	5
Hines v. *Davidowitz*, 312 U. S. 52	9, 10
In re Battelle, 207 Cal. 227, 241, 243	10
Kilbourne v. *Thompson*, 103 U. S. 168	10, 12
Kim v. *California*, 308 U. S. 147, 154	5
King Mfg. v. *Augusta*, 277 U. S. 100	5
McLean v. *Freiberger*, 215 Cal. 1	6
McGrain v. *Daugherty*, 273 U. S. 135, 170-71	10
State ex rel. v. *Fluent*, 191 Pac. (21) 241	12
Swing v. *Riley*, 13 Cal. (2) 513, 518	10
Treigle v. *Acme Homstead Assn.*, 297 U. S. 189, 197	12
U. S. v. *Belmont*, 301 U. S. 324, 331	10
U. S. v. *Curtiss Wright Export Corp.*, 299 U. S. 304, 317	10
U. S. v. *Owlett*, 15 Fed. Supp. 736	10

Page

U. S. v. *Pink*, 315 U. S. 203, 233 10
Washington Pension Union v. *Robinson ex rel.*, 17 LW 3112 12
Williams v. *Bruffy*, 96 U. S. 176 5

Statutes:

California Constitution, Art. IV:
Sec. 37 8
Sec. 4 6
Sec. 4b 6
Sec. 5 6
Resolution No. 86 8

U. S. Constitution:
Art. VI, Sec. 2 ..... 2, 9
XIVth Amendment 2

Codes:

Government Code 9412 6
Penal Code 17 6
Penal Code 1425 6
Penal Code 1426 6
U. S. C. (7) Alien Registration 10
U. S. C. (18) 11
U. S. C. (22) 11
U. S. C. (28) .....

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 690

VERN SMITH,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of this Court, the appellant herewith submits his statement showing that the appeal in the above entitled cause is properly before this Court.

Opinion Below

The opinion of the Superior Court of the State of California, in and for the County of Alameda, is not officially reported. A transcript of it is appended to this statement as Appendix "A."

Jurisdiction

1. Statutory Provisions Sustaining Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2).

2. State Statute Drawn Into Question and Decision In Favor of Its Validity

Appellant contended in the court below that Senate Resolution No. 75, of the 57th General Legislative Session, entitled "Resolution No. 75, as amended, relative to the creation of the Senate Fact-Finding Committee on Un-American Activities to investigate the activities of persons or groups known or suspected to be foreign dominated and controlled, and to recommend legislation for their regulation"—was unconstitutional on its face and as applied to appellant in that it dealt with the subject of foreign affairs, a subject reserved exclusively to the Federal Government, or in any event occupied by Congressional legislation, and thereby violated Article VI, sec. 2, of the United States Constitution.

Appellant contended in the alternative that if said resolution set up said committee otherwise than as an adjunct of the legislature, then the committee was no more than a group of private persons having no connection with the processes of government, and imposition of a fine for refusal to be sworn before such a group deprived appellant of property without due process of law in violation of the XIVth Amendment to the United States Constitution.

Appellant also contended that the said Resolution No. 75 was unconstitutional on its face and as applied in that it generally deprives appellant of liberty and property without due process of law in violation of the XIVth Amendment to the Constitution of the United States.

The decision of the court below sustained the validity of the resolution in its entirety. The resolution appears at R. 4-6. The title, preamble, and sections 1, 2, and 9, which define its subject matter read as follows:

> "Senate Resolution Number 75, was amended, relative to the creation of the Senate Fact-Finding Com-

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mittee on Un-American activities, to investigate the activities of persons or *groups known or suspected to be foreign dominated and controlled,* and to recommend legislation for their regulation:

"Whereas, These are yet times of public danger. Subversive persons and groups are endangering our domestic unity so as to leave us unprepared to resist *attack from without* or within. Under color of the protection afforded by the Bill of Rights these persons and groups seek to destroy our freedom by force, violence, threats, undermining and sabotage, and to subject us to the *domination of foreign powers* and ideologies; and Whereas, There is danger that the ordeal through which the Country has suffered to keep the pursuit of its ideals free may be in vain; and Whereas, Persons and groups, motivated by hatred of American ideals, our republican form of government and democratic processes, *some bound together by allegiance to foreign powers,* are even now seeking to achieve by subversion what we have so valiantly fought to sustain from force; and Whereas, California, as one of the laboratories of this great Nation, may profitably study the problem within its boundaries, and enact pertinent legislation therein, if facts are available therefor; and Whereas, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee; now, therefore, be it Resolved by the Senate of the State of California, That

"1. The Senate Fact-Finding Committee on Un-American Activities is hereby created and authorized and directed to investigate, ascertain, study and analyze all facts directly or indirectly *relating the foregoing,* to the activities of groups and "organizations whose membership include persons who are members of organizations who have as their objectives, or part of their objectives, the overthrow of the governments of the State of California or of the United States by

force and violence or other unlawful means, *all organizations known or suspected to be dominated or controlled by a foreign power,* which activities affect the conduct of this State in national defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this State supported in whole or in part by public funds, or any political program, or which may affect the conversion of the State from a wartime economy to a peacetime economy or affect the economic and social problems incidental thereto, including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to *the subject of this resolution,* and to report thereon to the Senate.

"2. In addition to the foregoing, the Senate Fact-Finding Committee on Un-American Activities is authorized and directed to *ascertain, study and analyze all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power,* and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social, ancestry and the activities of paid provocation and any other factors which may account for their conduct or condition their action, as well as the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to *the subject of this resolution,* and to report thereon to the Senate.

"9. The committee, or a subcommittee or the chairman when authorized by a majority vote of the entire committee, may meet outside the State with similar committees of Congress or of the several states." (Emphasis added.)

The other sections, *granting powers to the committee,* are relevant on the question of jurisdiction. They show

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that "the state gives the force of law" to the resolution, making it a statute within the rule of *King Mfg. Co.* v. *Augusta, infra.* A complete copy of the resolution is attached to this statement as Exhibit "B."

A resolution of one house of a state legislature is a "State Statute" within 28 U. S. C. 1257. See *King Mfg. Co.* v. *Augusta* 277 U. S. 100. This case dealt with a city ordinance but the analysis and definition of the word "statute" contained at pp. 107-114 are broad enough to include a resolution of one house of a state legislature, to which the state gives the force of law. See especially p. 110, quoting *Williams* v. *Bruffy,* 96 U. S. 176.

> "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this Court."

Cf. also *Hamilton* v. *Regents of U. C.,* 293 U. S. 245, 257-8.

3. Finality of Judgment

The judgment from this appeal is taken is in all respects final. It was rendered by the highest state court having jurisdiction of the case (see below) and that court has denied a petition for rehearing. The judgment imposed a fine of $300.00.

4. Judgment of Highest State Court

In California the Appellate Department of the Superior Court is the highest court which can pass on misdemeanor convictions rendered in any Justice's, Municipal or Police court.

Carlson v. *California* 310 U. S. 106, 111N5;
Kim v. *California* (sub nom *Schneider* v. *Irvington*), 308 U. S. 147, 154.

While the point has been determined at least twice, we give the state enactments which bring about this result:

a. Gov't Code 9412, under which appellant is charged, makes violation a "misdemeanor";

b. Penal Code 17 defines a "misdemeanor" as any crime punishable otherwise than by death or imprisonment in the state prison;

c. Penal Code 1425 gives Justice's and Police courts jurisdiction over misdemeanors;

d. Penal Code 1426 says that proceedings in such courts must be *by complaint;*

e. California Constitution Art. VI, sec. 5, provides that the Superior Courts shall have appellate jurisdiction in cases arising in municipal and justice's courts and such other inferior courts as may be provided by law;

f. California Constitution Art. VI, sec. 4, provides that the Supreme Court shall have appellate jurisdiction in criminal cases where judgment of death has been rendered and in cases transferred from the District Court of Appeal;

g. California Constitution, Art. VI, sec. 4b, provides that the Districts Courts of Appeal shall have appellate jurisdiction in criminal cases *prosecuted by indictment or information* (Other than death penalty cases).

This leaves the Superior Court as the only court having appellate jurisdiction over a criminal case commenced in the Police Court.

The following cases have held that no further review lies from a decision of the Superior Court reviewing a decision of one of the inferior courts.

Berkeley Guar. B. & L. Assn. v. *Cunningham,* 218 Cal. 714

McLean v. *Freiberger* 215 Cal. 1;

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5. Appeal Timely Taken

The judgment from which the appeal was taken was rendered October 28, 1948. Within the time prescribed by state law appellant petitioned for rehearing and this petition was denied on December 2, 1948. Petition for appeal to the United States Supreme Court was filed together with this statement on January 26, 1949, and the Hon. O. D. Hamlin, Judge of the Superior Court who decided the appeal in the state court made the order allowing the appeal to this court on January 26, 1949.

6. Constitutional Issue Timely and Sufficiently Raised

a. The objections to the constitutionality of the California State Senate Resolution No. 75 were made first in the trial court when the resolution was offered in evidence. (Tr. 11:15–12:19. R. 8-9).

b. They were made a second time in the trial court after the jury had retired. While the trial judge then said that this was not a proper time to raise these questions, he confirmed the fact that the questions had previously been raised properly and decided. (Tr. 122:13-124:2. R. 9-10).

c. The constitutional objections to said California State Senate Resolution No. 75 were raised in detail in the Appellate Department of the Superior Court by Appellant's Opening Brief in that court (R. 19-37 being the part discussing the constitutional questions).

d. The Appellate Department of the Superior Court considered and decided the constitutional issues in favor of the validity of Senate Resolution No. 75. (Opinion of Superior Court R. 39-40).

7. Nature of the Case

a. *In General*

California State Senate Resolution No. 75 of the 57th General Legislative Session purports to create the "Senate Fact-Finding Committee on Un-American Activities, to investigate the activities of persons or groups known or suspected to be foreign dominated or controlled and to recommend legislation for their regulation."

This committee subpoenaed the appellant, he appeared before it but was not sworn and did not testify. For purposes of the appeal to this court it will be assumed that his actions at the time constituted a wilfull refusal to be sworn (whether they did or not being purely a state question). He was found guilty of wilfull refusal to be sworn before the committee. The Federal question arises directly upon the resolution purporting to constitute the committee—(a) on its face and (b) as its scope was defined by the trial court in its instructions to the jury. *Appellant's position is that the construction adopted by the trial court (and affirmed on appeal) is the correct one.* If not, we still contend that under any construction the resolution is unconstitutional *on its face;* the construction adopted by the state courts (probably not being precedent) might then involve the constitutionality of the resolution *as applied.*

The title of the resolution (supra) deals *exclusively* with "persons or groups known or suspected to be *foreign dominated or controlled.*" The trial court instructed the jury that the scope of the resolution was as defined in its title (Tr. 117:19-23. R. 13).

If any further argument is needed on this point we submit (1) a reading of the resolution indicates that this is the correct construction; (2) this conclusion is reinforced by California Constitution Art. IV.sec. 37, and Resolution No. 86, indicating that each Senate Committee

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should deal with only one subject, (both quoted in the instructions Tr. 115:18-26; 116:8-21. R. 11-13, and (3) that if Resolution No. 75 should for any reason be construed to cover more than one subject this would not save it, since the objection to a state's entry into the field of foreign affairs is the international complications which may ensue (see below). The threat of such complications would be in no way lessened by the fact, if it be a fact, that the state combines its excursion into foreign affairs with other possibly harmless activities. In short, we claim that under our interpretation Resolution No. 75 is inconstitutional on its face, violating Art. VI. sec. 2, of the United States Constitution.

b. *Federal Questions are Substantial*

(1) State attempts to enter the field of foreign affairs have been held unconstitutional even where they touched foreign affairs much less directly than Resolution No. 75, supra. Thus *Hines* v. *Davidowitz* 312 U. S. 52, held the Pennsylvania alien registration act unconstitutional. But that dealt merely with individual aliens—all of whom were presumably under the control of the United States and of the State of Pennsylvania in which they lived. Resolution No. 75 on the other hand, deals expressly with "persons or groups known or suspected to be foreign dominated or controlled"—and thus brings itself into direct collision with control exercized by or from a foreign country. The body of the resolution uses the phrase "dominated or controlled by a foreign power" obviously referring to a foreign *government*. It touches foreign affairs much more directly than the Pennsylvania Alien Registration Act.

Similarly *Chy Lung* v. *Freeman*, 92 U. S. 275, held unconstitutional what was in effect a California state immigration law. While it dealt with individuals entering the state by water, it dealt only with individuals as such, not with con-

trol or domination exercized by or from a foreign country. Resolution No. 75 touches foreign affairs at least as much, probably more than the act in *Chy Lung* v. *Freeman.*

(2) California follows the usual rule that a state committee is an adjunct of the legislature and has no greater power than the legislature itself (*Swing* v. *Riley,* 13 Cal. (2) 513, 518). *Kilbourne* v. *Thompson,* 103 U. S. 168, holds that where the resolution creating a legislative committee deals with a subject beyond the legislature's constitutional powers a witness is not amenable to such a committee. The case has been approved to the extent of this holding. See *McGrain* v. *Daugherty,* 273 U. S. 135, 170-71.

California follows the decisions of this court on the rights of witnesses before legislative committees, so its decisions in no way complicate the federal question, supra. See *In re Battelle,* 207 Cal. 227, 241, 243, adopting the foregoing cases as state precedent.

(3) *U. S.* v. *Owlett,* 15 Fed. Supp. 736 (D. C. M. D. Penn) holds squarely that a state legislative committee cannot investigate a purely federal matter (W. P. A.). See especially 15 Fed. Supp. 736, 742 par. [6]. It is the only case we have found on the precise issue.

(4) Some authorities hold that the states have no power whatever in the field of foreign affairs (*U. S.* v. *Pink,* 315 U. S. 203, 233; *U. S.* v. *Belmont,* 301 U. S. 324, 331; see also *U. S.* v. *Curtiss Wright Export Corp.,* 299 U. S. 304, 317). *Hines* v. *Davidowitz,* 312 U. S. 52 places unconstitutionality upon an Act of Congress which occupies the field. If the latter theory applies, appellant claims that the following acts of Congress occupy the field here, so that their pattern cannot be altered by any state.

a) Alien Registration Act, 7 U. S. C. 451-460, prescribing registration and fingerprinting of aliens remaining in the

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country over thirty days; requiring notice of change of address; exempting foreign government officials and members of their families; authorizing special rules for alien seamen, holders of border crossing cards, and other specially enumerated classes.

b) Act Forbidding Anyone to Act as Foreign Governmental Agent Without Notice to Secretary of State, 22 U. S. C. 601;

c) Foreign Agents Registration Act, 22 U. S. C. 611-621, requiring registration of agents of a "foreign principal"; and prescribing data to be furnished; granting enumerated exemptions; filing and labeling of propoganda; imposing penalties;

d) Act Prohibiting Making False Statements to Influence Conduct of Foreign Governments Towards United States, 22 U. S. C. 231;

e) Act Prohibiting Wrongful Assumption of Character of Diplomatic or Consular Office, 22 U. S. C. 232;

f) Act Punishing Conspiracy to Injure Property of Foreign Governments, 22 U. S. C. 234;

g) Logan Act—Prohibiting unauthorized attempts to influence foreign governments in controversies with United States, 18 U. S. C. 5;

h) Act Prohibiting Aiding Foreign Governments in Derrogation of Rights of United States, 18 U. S. C. 98;

i) Acts Prohibiting Offenses Against Neutrality (Enlisting against friendly power), 18 U. S. C. 21-24;

j) Act Prohibiting Unauthorized Wearing of Uniform of Friendly Nation, 22 U. S. C. 246.

k) Acts Prohibiting Export of Munitions.—Providing penalties and procedure, 22 U. S. C. 401-410.

l) Lend Lease Act—Authorizing certain shipment of munitions, etc., to foreign states, 22 U. S. C. 411-423.

m) Neutrality Act—Prohibiting, inter alia, solicitation of funds on behalf of foreign government after presidential proclamation, 22 U. S. C. 441-452.

(5) If the committee is divorced from legislation its members are mere private individuals (*Kilbourne* v. *Thompson*, 103 U. S. 168, 195). Sanctions imposed for a non governmental purpose deny due process of law (Cf. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 197).

(6) The question presented by this case is of great importance. Other states besides California have legislative committees to investigate so-called Un-American activities (e. g. See *State ex rel.* v. *Fluent*, 191 Pac. (21) 241; cert. den. sub. nom.; *Washington Pension Union* v. *Robinson ex rel.*, 17 L. W. 3112).

In a period when international relations are the subject of continuous political controversy it is essential to determine how far, if at all, the states can enter this field on their own initiative and how far they can take action independent of the federal government.

Conclusion

It is respectfully submitted that the appellant in the above entitled case comes properly within the jurisdiction of this Court.

GEORGE OLSHAUSEN,
Attorney for Appellant.

CARL E. BROWN,
Of Counsel.

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APPENDIX "A"

(TITLE OF COURT AND CAUSE)

Court House, Oakland, California,
Friday, October 29, 1948, 10:00 A. M.

Opinion Affirming Judgment

(Excerpt from Proceedings)

Appearances:

For the Plaintiff and Respondent: William J. McGuiness, Deputy District Attorney.

For the Defendant and Appellant: George G. Olshausen, Esq.

The Court: This is an appeal from a conviction by a jury for refusal of the defendant to be sworn as a witness in a hearing of the so-called Tenney Committee. The Court has carefully examined the transcript and the briefs that have been filed by both sides. The Court feels that the resolution of the State Legislature creating the Tenney Committee is constitutional and that the resolution clearly covers matters which may be the subject of State legislation. Second, the Court feels that the resolution does not violate the Constitution by abridging the right of free speech and does not violate Article I, Section 19 of the Constitution of California, which refers to unreasonable searches and seizures.

The evidence produced at the trial was amply sufficient to support the verdict. The defendant manifestly and openly so conducted himself as to result in a refusal to be sworn as a witness. Instructions upon the attempt to commit the crime were neither justified by the evidence nor requested by the defendant.

After careful examination of all of the briefs and of the testimony, it is the judgment of the Court that the judgment of the lower court should be and it is hereby affirmed.

Exhibit "B"

"Senate Resolution Number 75, as amended, relative to the creation of the Senate Fact-Finding Committee on Un-American Activities, to investigate the activities of persons or groups known or suspected to be foreign dominated and controlled, and to recommend legislation for their regulation:

"Whereas, These are yet times of public danger. Subversive persons and groups are endangering our domestic unity so as to leave us unprepared to resist attack from without or within. Under color of the protection afforded by the Bill of Rights these persons and groups seek to destroy our freedom by force, violence, threats, undermining and sabotage, and to subject us to the domination of foreign powers and ideologies; and Whereas, There is danger that the ordeal through which the Country has suffered to keep the pursuit of its ideals free may be in vain; and Whereas, Persons and groups, motivated by hatred of American ideals, our republican form of government and democratic processes, some bound together by allegiance to foreign powers, are even now seeking to achieve by subversion what we have so valiantly fought to sustain from force; and Whereas, California, as one of the laboratories of this great Nation, may profitably study the problem within its boundaries, and enact pertinent legislation therein, if facts are available therefor; and Whereas, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee; now, therefore, be it Resolved by the Senate of the State of California, That

"1. The Senate Fact-Finding Committee on Un-American Activities is hereby created and authorized and directed to investigate, ascertain, study and analyze all facts directly or indirectly relating to the foregoing, to the activities of groups and organizations whose membership include persons who are members of organizations who have as their objectives, or part of their objectives, the overthrow of the

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governments of the State of California or of the United States by force and violence or other unlawful means, all organizations known or suspected to be dominated or controlled by a foreign power, which activities affect the conduct of this State in national defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this State supported in whole or in part by public funds, or any political program, or which may affect the conversion of the State from a wartime economy to a peacetime economy or affect the economic and social problems incidental thereto, including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

"2. In addition to the foregoing, the Senate Fact-Finding Committee on Un-American Activities is authorized and directed to ascertain, study and analyze all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power, and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social, ancestry and the activities of paid provocation and any other factors which may account for their conduct or condition their action, as well as the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

"3. The committee shall consist of six Members of the Senate appointed by the Committee on Rules thereof. Vacancies occurring or existing in the membership of the committee shall be filled by the appointing power.

"4. The committee is authorized to act during this session of the Legislature, including any recess, and after final adjournment until the final adjournment of the 1949

Regular Session, with authority to file its final report not later than the last legislative day of that session.

"5. The committee and its members shall have and exercise all of the rights, duties and powers conferred upon the investigating committees and their members by the provisions of the Joint Rules of the Senate and Assembly and the Standing Rules of the Senate as they are adopted and amended from time to time, which provisions are incorporated herein and made applicable to this committee and its members.

"6. The committee has the following additional powers and duties:

"a. To select a chairman and a vice chairman from its membership, and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

"b. To contract with such other agencies, public or private, as it deems necessary for the rendition and affording of such services, facilities, studies and reports to the committee as will best assist it to carry out the purposes for which it is created.

"c. To cooperate with and secure the cooperation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of this resolution and to direct the sheriff of any county to serve subpenas, orders and other process issued by the committee.

"d. To report its findings and recommendations to the Legislature and to the people from time to time and at any time, not later than herein provided.

"e. To do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution.

"f. To create subcommittees from its membership assigning to the subcommittee any study, inquiry, investigation

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or hearing which the committee itself has authority to undertake or hold, and the subcommittee for the purposes of this assignment shall have and exercise all of the powers conferred upon the committee limited by the express terms of the resolution or resolutions of the latter defining the powers and duties of the subcommittee, which powers may be withdrawn or terminated at any time by the committee.

"g. To adopt and from time to time amend such rules governing its procedure, including the fixing of its own quorum and the number of votes necessary to take action on any matter, as may to it appear appropriate.

"h. To hold public hearings at any place in California at which hearings the people are to have an opportunity to present their views to the committee.

"i. To summon and subpena witnesses, require the production of papers, books, accounts, reports, documents, and records of every kind and description, to issue subpenas and to take all necessary means to compel the attendance of witnesses and procure testimony.

"j. To report its findings and recommendations to the Legislature and to the people from time to time and at any time, not later than herein provided.

"7. The committee, each of its members, and any representative of the committee thereunto authorized by the committee or by its chairman, is authorized and empowered to administer oaths.

"8. Every department, commission, board, agency, officer and employee of the State Government, including the Legislative Counsel, the Attorney General and their subordinates, and of any political subdivision, county, city, or public district of or in this State shall furnish the committee and any subcommittee, upon request, any and all such assistance, and information, records and documents as the committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created.

"9. The committee, or a subcommittee or the chairman when authorized by a majority vote of the entire committee,

may meet outside the State with similar committees of Congress or of the several states.

"10. The sum of thirty thousand dollars, $30,000, or as much thereof as may be necessary, is hereby made available from the Contingent Fund of the Senate for the expenses of the committee and its members and for any charges, expenses, or claims it may incur under this resolution, to be paid from said Contingent Fund, and disbursed, after certification by the chairman of the committee, upon warrants drawn by the State Controller upon the State Treasurer."

(1767)

BLEED THROUGH – POOR COPY

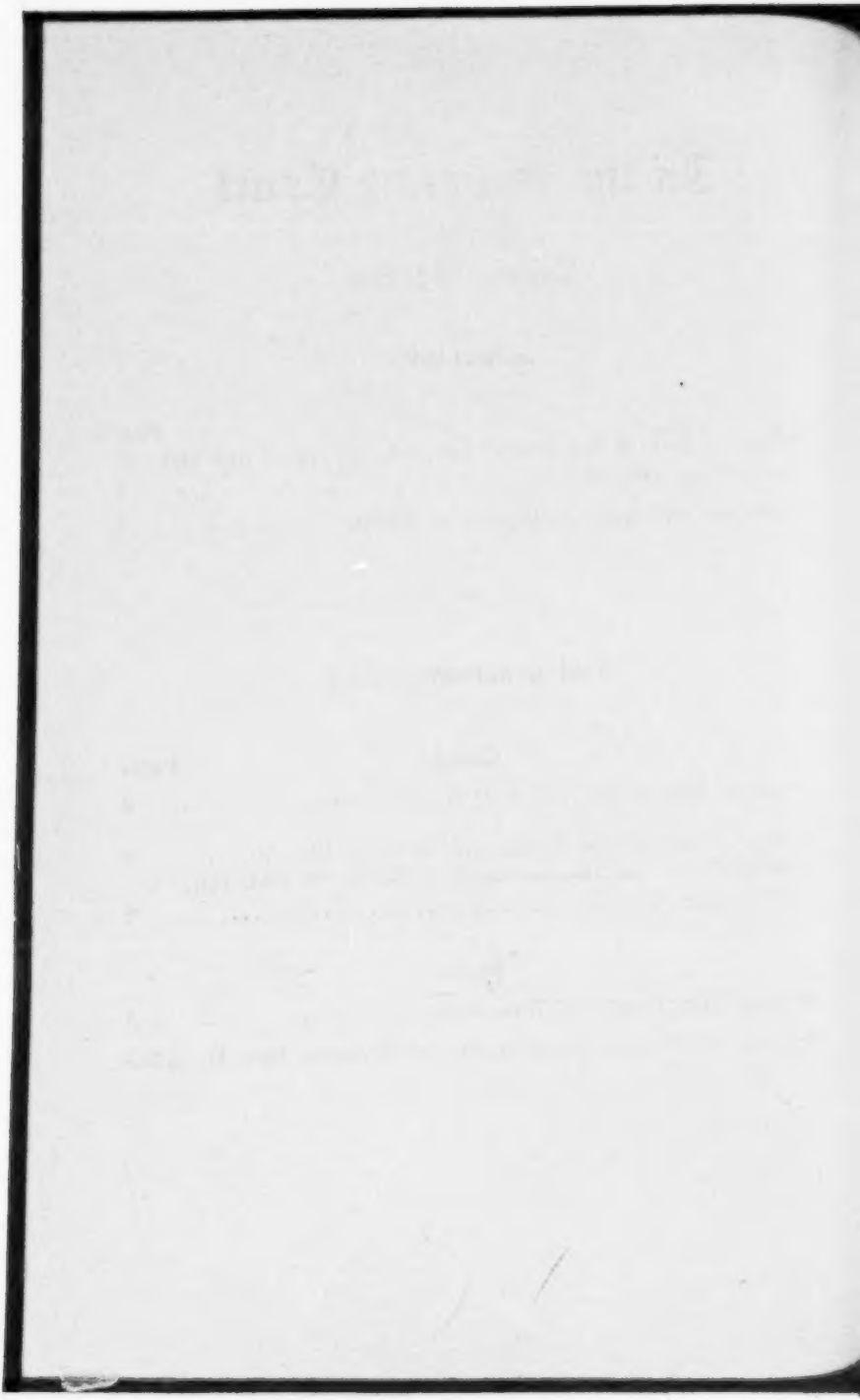
Subject Index

	Page
Motion for leave to file petition for rehearing out of time and supporting affidavit	1
Points and authorities in support of motion	5

Table of Authorities Cited

Cases	Pages
People v. Bryant, 207 Cal. 450, 278 Pac. 1025	6
Savage v. Cannon, 204 S. Car. 473, 30 S. E. (2d) 70	6
Security Trust and Savings Bank v. Walsh, 91 Fed. (2d) 481 (C.C.A. 9)	6

Rules	
Rules of Civil Procedure, Rule 60(b)	5
Rules of the Supreme Court of the United States, Rule 33	2, 3, 5



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 690

VERN SMITH,
Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND SUPPORTING AFFIDAVIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellant hereby moves this Honorable Court for leave to file his petition for rehearing out of time.

The appeal was dismissed for want of a "substantial Federal question". Petitioner filed a petition for

rehearing, mailing the same to reach the Clerk's office on or before May 20, 1949. This was within the former 25 day period under Rule 33, but not within the shortened period of 15 days under the rule as amended.

This motion is made upon the ground that the filing of the petition for rehearing after more than 15 but less than 25 days resulted from the excusable inadvertence of counsel in overlooking the change of time and that it is in the interest of justice to permit the petition for rehearing to be filed and to be heard on its merits and that no prejudice has resulted or can result from the delay.

The motion is based upon the affidavit of George Olshausen and upon supporting points and authorities, both attached hereto, and upon all the papers and files in the case.

Dated, San Francisco, California,
June 7, 1949.

GEORGE OLSHAUSEN,
Attorney for Appellant.

CARL E. BROWN,
Of Counsel.

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State of California,
City and County of San Francisco.—ss.

George Olshausen, being first duly sworn, deposes and says:

That I am and at all times herein mentioned, was attorney for the appellant in the above entitled case; that I was familiar with Rule 33 of the Supreme Court as it stood before January 1, 1948, providing for a 25 days period for filing a petition for rehearing. I prepared the petition with the filing date in mind, 25 days later than the order dismissing the appeal, and had the petition filed within such time. This is the first case which I have handled in the United States Supreme Court since the change of the rule and I had overlooked the amendment which shortened the time for rehearing to 15 days. It was for this reason that the petition for rehearing was offered for filing more than 15 days from the Court's order.

No prejudice will result from the delay of a few days, particularly since the defendant made a deposit as security for his fine while the case was still in the State Court and which money is still on deposit.

GEORGE OLSHAUSEN.

Subscribed and sworn to before me this 7th day of June, 1949.

(Seal) Jane M. Dougherty,
Notary Public in and for the City and County of San Francisco, State of California.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 690

VERN SMITH,
Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION.

Rule 33 provides that time for filing a petition for rehearing may be enlarged by order of a Justice or of the Court. It does not require that such order must be before the expiration of the time provided. Good cause for such extension must comprise at least those matters which constitute good cause under Rule of Civil Procedure 60(b).

Authorities arising under similar statutes hold that confusion as to time for filing is excusable neglect and good ground for setting aside a default.

Security Trust and Savings Bank v. Walsh, 91 Fed. (2d) 481, 484 (C.C.A. 9);

Savage v. Cannon, 204 S. Car. 473, 30 S.E. (2d) 70, 71;

People v. Bryant, 207 Cal. 450, 451-2, 278 Pac. 1025 (confusion due to recent change of statute).

Dated, San Francisco, California,
June 7, 1949.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Appellant.

CARL E. BROWN,
Of Counsel.

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No. 690. SMITH *v.* CALIFORNIA. Appeal from the Superior Court in and for the County of Alameda, California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *George Olshausen* for appellant.